

MINUTES OF OCTOBER 24, 2003 MEETING AT 12:00PM

MEMBERS PRESENT: Sharon Stern Gerstman, David B. Hamm, David L. Ferstendig, Rob Knapp, Joseph Einstein, Jim Gacioch, Michael Schmidt, Michael Greenspan, Kim Juhase, Bill Altreuter, Sanford Konstadt, Jacqueline Hattar, Debra Lewis, Michael D. Stallman, Bill Roth, Steven L. Sonkin, Allan Young, Maurice Chayt, Steve Critelli, Harold Obstfeld, Matthew Kreinces, Paul Aloe, Ray Bragar.

BY TELEPHONE: John J. Jablonski

The meeting was called to order at 12:30pm

I. INTRODUCTION/APPROVAL OF MINUTES (ATTACHMENT A TO AGENDA)

Motion by Jim Gacioch to approve the minutes of the May 16, 2003 meeting, seconded by Matt Kreinces, was unanimously passed.

II. REPORT ON LEGISLATIVE PROPOSALS WHICH HAVE BEEN ENACTED (Sharon Gerstman)

The Committee's subpoena bill has been passed (ch. 547 of laws of 2003)

III. REPORT ON LEGISLATIVE PROPOSALS STILL PENDING (Sharon Gerstman)

The CPLR 3212 summary judgment bill (Attachment B to agenda), which was an OCA bill based on our committee's proposal, was very close to passing last year and will be reintroduced this year.

IV. FINAL VERSION OF COMMITTEE REPORTS TO GO TO THE EXECUTIVE COMMITTEE

A. CPLR 4532-a (M. Chayt) (Attachment C to agenda)

Motion by Rob Knapp to approve Maurice Chayt's report, seconded by Michael Schmidt, was unanimously passed. The report will be put on the Executive Committee Agenda for January 2004.

B. CPLR 312-a (M. Schmidt) (Attachment D to agenda)

Will be on January 2004 meeting agenda.

V. MENDON PONDS/CLERK PROJECT (Attachment E) (Sharon Gerstman and Paul Aloe)

Sharon Gerstman: The NYS Senate and Assembly adopted Sharon and Paul's language. The only way to get the bill introduced at the late date was through the OCA. Michael Colodner did not like the provision that the clerk cannot unilaterally reject papers, etc. Because the OCA would not agree to the language, the legislative people said they might submit the bill with the "problem" language, without the OCA.

Paul Aloe: He went over the various proposed amendments, primarily to CPLR 2102. CPLR 2102(c) is the most controversial portion because it forbids the clerk from rejecting a paper presented unless specifically directed by statute or rules of the chief administrator or by court order. The clerks and the OCA "hate" this provision.

What happens in other "inferior" courts? (see §105(e)): one proposal was to eliminate the language "an action or proceeding in Supreme or County Courts" in CPLR 2102(a), or just divide CPLR 2102(a) into two sentences with the second sentence beginning with the words: "In an action or proceeding".

Motion by M. Schmidt to approve the amendment language, seconded by Ray Bragar, was unanimously passed.

VI. OTHER CPLR CHANGES

A. HPPA authorization (see CPLR 3122, effective September 3, 2003) (Matthew Kreinces).

Matthew Kreinces: There are various problems raised by HPPA's reach. For example, records are not being produced notwithstanding service of the authorization. In addition, under CPLR 3122, as amended, it appears that medical providers can charge whatever they want for copying costs as "reasonable".

Michael Stallman: He disagrees with the Court's decision (Judge Straniere's) set forth in the handout.

Sharon Gerstman: The Committee can suggest an amendment to CPLR 3122 to alleviate the problem.

Currently, CPLR 3122 requires that an authorization be appended to a subpoena, without reference to the HPPA carve-outs.

The issue arose as to whether the Committee should tackle multiple HPPA issues or focus on the authorization issue only.

It was agreed that Matt Kreinces would chair a subcommittee to correct problems raised by CPLR 3122, in relation to HPPA. The other members of the subcommittee will be: Jim Gacioch, Mike Stallman, Sanford Konstadt and John Jablonski.

B. CPLR 7803(5) (Attachment F) (David L. Ferstendig)

It was agreed that the amendment was poorly drafted and its placement in CPLR 7803 did not make much sense. Apparently, the statute was passed to make state law conform with federal regulations. It appears that the statute is saying that a proceeding to review the final determination or order of the state review officer under Education Law §4404(3) is to be brought under CPLR Article 4 and not Article 78. The second sentence is particularly confusing (use of words “however” and “this article”).

VII. CLE ON ARTICLE 50-A

A comprehensive review of the Article 50-A amendments (provoked by the decision in Desiderio) was given by Matt Kreinces, Rob Knapp and Paul Aloe. Their presentation, insights and handouts were outstanding. Both the plaintiffs’ and defendants’ bar seem to agree that the Desiderio decision required an amendment of the statute. The question is whether these amendments raised other issues and the extent of the applicability of the amendments, since Article 50-B was not amended (Article 50-A relates to medical, dental and podiatric malpractice actions). Clearly, it applies to fairly large cases and only to cases commenced after the effective date.

Questions were then solicited, including:

- Is it possible to predict in 2003 what it will cost to treat a seriously injured child in 2031?
- Does the amendment raise other unintended issues?
- Should we go back to the “old” law, i.e., CPLR 4111(f) and the total repeal of Articles 50-A and 50-B?
- How does sliding scale contingency fee dovetail with the statute?
- What is the security of the end product, that is, the annuities?

VIII. OTHER SUBJECTS

A. Notice to Admit (Michael Greenspan):

He handed out proposed language changes to CPLR 3123, to permit a determination of the sufficiency of the answers to a Notice to Admit prior to the filing of the Note of Issue. It will also require amendments to CPLR 3124.

Sharon Gerstman: She will circulate amendments to the Committee for comments and language suggestions.

B. Revised Uniform Arbitration Act (S. Critelli) (Attachment G)

The intention is to replace Article 75 with the Act. Steve mentioned some

preliminary problems/issues including: there is no separate treatment of the manner in which statute of limitations issues are decided; what is an “interim award”?; there is no mechanism to appeal the issue that there was no agreement; allowance of attorneys’ fees (deviation from common law); venue provisions (lays venue where adverse party resides or doing business; does not contain provision for making motion in same proceeding); no appeal from denial of motion to stay (the federal rule).

Sharon Gerstman: Kim Juhase, Bill Roth, Steven Critelli and Paul Aloe will form a subcommittee to address these and other issues, and will report in early December 2003.

Respectfully submitted,

David L. Ferstendig
Secretary